

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

To be argued by
LOUIS A. TIRELLI
Estimated time:

75-1343

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CARLOS FAYAD,

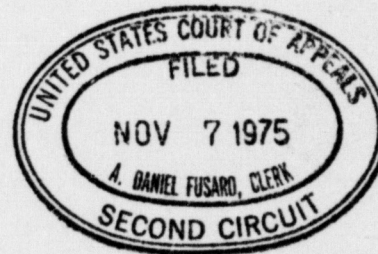
Defendant-Appellant,

-against-

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

BRIEF FOR DEFENDANT-APPELLANT



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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CARLOS FAYAD,

Defendant-Appellant,

Docket No. T 5196

-against-

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

- - - - - X

BRIEF FOR DEFENDANT-APPELLANT

Statement of the Case

Defendant-Appellant and two others were indicted in the United States District Court, for the Eastern District of New York by an indictment having four separate counts, of which Defendant-Appellant was named in Counts 2, 3 and 4 only.

Count Two covered the substantive crime of knowingly and intentionally distributing a Schedule II narcotic drug controlled substance. Count Three covered the substantive crime of knowingly and intentionally possessing with intent to distribute a Schedule II narcotic drug controlled substance. Count Four covered the crime of knowingly and intentionally combining and conspiring to distribute quantities of a Schedule II narcotic drug controlled substance.

Thus, Counts Two and Three were substantive crimes, while Count Four was the conspiracy crime. Defendants PAULA DALLAL and the Defendant-Appellant herein, pleaded "Not Guilty", but on July 16, 1975 after a jury heard the case before the HONORABLE THOMAS C. PLATT, the jury returned a guilty verdict against the Defendant-Appellant on two of

the counts charged against him. Suprisingly, Count Three which was the only Count in which co-defendant PAULA DALLAL was not named, was the only Count on which CARLOS FAYAD, the Defendant-Appellant herein was found "Not Guilty" by the jury. The Court set September 5, 1975 for sentencing of the Defendant-Appellant, and on that day Defendant-Appellant was sentenced to five years in prison.

A post-trial motion was submitted to the Honorable THOMAS C. PLATT, but the motion was not granted by the bench. Nevertheless, subsequent to sentencing, a Notice of Appeal was immediately filed by Defendant-Appellant's attorney.

It is to be noted that a third co-defendant ROBERT O'BRIEN was part of the trial during the selection of the jury. However, subsequent to selecting the jury with co-defendants PAULA DALLAL and Defendant-Appellant, ROBERT O'BRIEN changed his position to become a government witness, and pleaded "Guilty" to one or all of the Counts in the indictment.

Question Presented

Does counsel's request for an insulating instruction to the jury where there is a conspiracy charge in the indictment, ^{constitute} a reversible error when the presiding Justice refuses to so give such insulating instruction?

The post-trial motion to the Honorable Justice THOMAS C. PLATT answered this question in the negative.

Argument

THE FAILURE OF THE COURT TO ISSUE
A PROPER INSULATING INSTRUCTION
ADVERSELY AFFECTED THE RIGHTS OF
THE DEFENDANT-APPELLANT CARLOS FAYAD
AND CAUSED A MANIFEST MISCARRIAGE
OF JUSTICE.

It is Defendant-Appellant CARLOS FAYAD's contention that the crime of conspiracy, and crimes relating directly to conspiracy, by their very nature allow for a jury finding of guilt by association. This injustice is magnified even further when one of the co-defendants becomes a government witness immediately before trial.

The danger of transferred guilt is acute when the jury is presented with testimony relating directly to the relationship with persons now admitting guilt.

The Supreme Court has held that the possibility of injustice to particular individuals in a conspiracy case is so great that extraordinary precaution is required in the giving of instructions which will insure that an individual defendant does not lose his identity in the mass. Hudson v. North Carolina, 362 U.S. 697, 702, 80 S. Ct. 1314, 1317, 4 L. Ed. 2d. 1500 (1960), United States v. Kimhew, 380 F. 2d 538, 540 (6th Cir. 1967); United States v. Dardi, 330 F. 2d 316, 332, 333 (2nd Circuit), cert. denied, 379 U.S. 845, 85 S. Ct. 50, 13 L. Ed. 2d 50 (1965); Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946).

The appellate counsel did in fact request an insulating instruction, and it is now the Defendant-Appellant CARLOS FAYAD's contention that it was reversible error not to grant it. It is true that the appellate counsel presumably withdrew his request, but only because the Court asked another defendant's counsel for permission to issue an insulating instruction. This in fact, demonstrates plain error, and although counsel submitted to the Court's restrictions, the objection was in fact made and should have been granted in the first instance.

Defendant-Appellant CARLOS FAYAD was deprived of a fair trial by being combined with the co-defendants in the charge to the jury. The lack of a proper insulating instruction does not in itself necessarily constitute reversible error, but in light of the objection being entered and the necessity of fairness a reasonable doubt as to harm exists. United States v. King, 505 F. 2d 602, 607 (5th Cir. 1974).

The Courts have demonstrated an understanding of the importance of a judge's charge to the jury. It has been stated that the jury hangs on his every word. United States v. Ah Kee Eng, 241 F. 2d 157, 161 (1957). It is this very contention that the Defendant-Appellant makes.

The Court did state that the guilt or innocence of each defendant should be considered separately and independently, and if counsel had not requested a more specific instruction plain error should be the standard used for reversal. However, in light of counsel's objection, the Court's relinquishment of a leadership role, and the inherent nature of a conspiracy charge with its possibility of transferred guilt, it is respectfully submitted that the Court should find reversible error.

Conclusion

FOR THE REASONS ABOVE STATED, THE
DECISION OF THE JURY SITTING IN THE
FEDERAL EASTERN DISTRICT SHOULD BE
REVERSED.

Dated: Spring Valley, New York, October 30, 1975

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Plaintiff

against

CARLOS FAYAD

Defendant

Index No.

75-1343

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

FABIO OCHOA

SS.:

being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 26-14

91st Street, Corona.

That on the 7th day of November

19 75 at 225 Cadman Plaza,

Brooklyn, N.Y.

deponent served the annexed Brief for Defendant-Appellant and Appendix upon

U.S. Attorney

the Appellee

in this action by delivering a true copy thereof to said individual

personally. Deponent knew the person so served to be the person mentioned and described in said papers

as the office of the U.S. Attorney herein,

Sworn to before me, this

day of November

7th

19 75

LOUIS A. TIRELLI

Notary Public, State of New York

Reg. No. 3989430

Residing in Rockland County

Commission Expires Mar. 30, 19 77